CULTURE, UNIVERSALITY AND HUMAN RIGHTS IN THE TWENTY-FIRST CENTURY*

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Notwithstanding abundant evidence to the contrary, the dominant discourse lays great stress on the universal nature of human rights. Since we are all human, the argument runs, we are all born free and equal - and it is paradoxical that it was one of the great liberal philosophers, Jean-Jacques Rousseau, who referred to the chains in which so many live. It is therefore somewhat contradictory to find the globalisation of capitalism, a system predicated upon the denial of substantive equality, accompanied bv a politico-legal ideology that apparently stresses the opposite. However, since the dispossessed masses do not appear likely to rise up against multinational capital, it may be overly cynical to deny the progressive and liberating nature of the discourse.

THE DOMINANT DISCOURSE: UNIVERSALITY

The dominant discourse originated in the Western political theory that rationalised the rise of the property-owning bourgeoisie on both sides of the Atlantic. Historically and contextually bound, it has, like capitalism itself, proved astonishingly durable. The free and equal human being in the state of nature, once endowed with rights, became a free and equal participant in the marketplace. Free to speak at will and free to own property, such individuals do not, significantly, have rights to food or shelter. And, equally importantly, the noble savage has become the possessive individual, an abstract shorn of all the cultural trappings and individual characteristics that are irrelevant in the market.

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Coinciding with the rise of modernity, the dominant discourse was a celebration of individualism at the expense of the individual. As Shivji (1989:45) has argued:

> In its conservative role, natural law justifies the existing order by providing a divine sanctity to the rulers and their law while, in its revolutionary role, it provides a mobilizing ideology to the rising classes for the overthrow of the existing order. In both cases, natural law theories, and their latter-day derivative, 'natural rights' theories, are essentially political, class-based ideologies, here playing a legitimising and there playing a mobilising role.

Natural law and natural rights thus underpin all arguments in favour of a universalistic conception of human rights. They provide the intellectual cement for the construction of a globalised discourse which asserts that 'all human beings are born free and equal in dignity and rights' (Art. 1 of the Universal Declaration of Human Rights). Derived from the French and American Revolutions, this noble sentiment ignores the fact that full citizenship was extended to women less than a century ago, and that it required a civil war for blacks to be admitted to personhood in the United States, a victory that has so far proved to be somewhat more formal than substantive. Those states that have shouted loudest about the need for human rights have not always been at the forefront in granting human rights to ethnic, racial, and other minorities, both within and beyond their borders.

Nonetheless, they are usually those in the forefront of assertions of universality, not at least because, they argue, a majority of governments have either participated in the formulation of international standards or subsequently ratified them.

In addition to its demand for universality, the dominant discourse is characterised by its emphasis on the prioritisation of civil and political rights over all other rights, the celebration of possessive individualism and, paradoxically, a pronounced statist bias. It is widely accepted, however, that the so-called International

Bill of Rights[1] is of Western origin. Writers such as Howard (1986) have argued that human rights have universal validity and applicability whatever their origins. She argues that they are individual claims or entitlements against the state and in this sense there is only one, Western, conception. The problems of postmodernism notwithstanding, it is somewhat difficult to see why ideologies like Marxism or Stalinism should be so widely rejected while the dominant discourse, equally totalising in the hands of authors, is so celebrated. It is certainly hard to distinguish the point at which claims about universality shift from promoting human rights to that of denying them.

It is this essentially colonial attitude that is profoundly threatening to non-Western culture. Culture is defined in many different ways, but for the purposes of this paper I will take it to mean 'the totality of values, institutions and forms of behaviour transmitted with a society, as well as the material goods produced... [and] covers *Weltanschauung,* ideologies and cognitive behaviour (Geertz 1973:89) Culture therefore shapes both consciousness and behaviour, values, norms and attitudes. While it is continually developing it is also tenacious, and it is not uncommon for individuals to maintain contradictory positions. Culture is at the core of socialization, and its impact is often underestimated precisely because it is so powerful and so deeply embedded in self-identity and consciousness. It is regularly taken for granted and, as An-Na'im (1992:23) puts it: "culture influences, first, the way we see the world and, further, how we interpret and react to the information we receive."

It is perhaps for this reason, amongst others, that voices of dissent are being raised in the South as we head towards the millenium. Assertions that human rights are universal are, they argue, a subtlely disguised attempt by liberal capitalist societies to undermine the economic development of less developed countries. Equally important, they say, is that attempts to make human

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[1]Comprising the *Universal Declaration of Human Rights* and the *1966 Covenants on Civil and Political, and Economic, Social and Cultural Rights.*

rights universal constitute an attack on cultural traditions and values that are tantamount to cultural imperialism.

The implications of both positions are disturbing. If human rights are, or are becoming, universal then we are confronted by a dangerous homogenization of global culture under the onslaught of a capitalism that has not always shown the greatest respect for non-Western cultures. Like Coca-Cola, abortion should be available on demand, and the likes of Fukuyama (1992) can celebrate the end of the Cold War by proclaiming the 'end of history' on the basis that the only viable option available to developing countries is liberal capitalism. The trend is reinforced by *Our Global Neighborhood*, the 1995 (p. 57) Report of the Commission on Global Governance, which argues that traditional terms like East and West are losing their meaning. With the abandonment of communism, capitalism has become even more of an omnibus term that hides different ways of organizing market economies. Similarly, says the Comission, the North-South dichotomy is becoming less sharp. The implication is clear: since we all live in a global village we should all share the same values.

Disturbingly, these arguments tend to ignore the ruthless nature of the assault by capitalism on different cultural traditions. Assuming the 'white man's burden' the colonial powers undertook a 'civilising mission' predicated upon another philosophical conception deeply rooted in Western modernism. At the centre of the colonial enterprise lay the ostensibly liberal notion of 'Otherness' which, like a Blakean antinomy, depended for its very existence on the definition of the alien other as different and inferior. It is a theme that has united anti-Semitism and apartheid, and produced, in Africa, a bastardised form of customary law suited more to the needs of the colonisers than the traditions of the colonised. As recently as 1979 Margaret Thatcher was warning of the dangers of her people being 'swamped' by those of colour. The demonization of Islam in the West should not, therefore, be surprising, and to pretend that the dominant

discourse is value-neutral is to adopt an ideological position deeply rooted in the Western psyche and Southern fears.

THE COUNTER-ARGUMENT: CULTURAL RELATIVISM

If, on the other hand, the dominant discourse is not universal, the implications for the promotion and protection of human dignity[2] areequally profound. The only alternative is a descent into a cultural relativism, that is tailor made for those who wish to deny human freedom. It is perhaps not a coincidence that those voices in the South loudest in the denial of the universality of human rights are from authoritarian countries in South and South-east Asia in which economic development has consistently taken precedence over democracy (see Adelman, 1993). More than a decade ago the Malaysian government was arguing that:

> The concept of freedom and rights held bv developed countries, especially European countries, is different from the one held by developing countries... [ILO] Conventions... invite resentment and resistance from developing countries, including Malaysia, because they are not practical to the political systems and the security of their countries...[3]

This statement encapsulates the dilemma. On the one hand, there is some justification in the argument that it is

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[2]I use human dignity rather than human rights purposely for two reasons. First, the reduction of all things to rights and hence to law is, it seems to me, a peculiarity, a Western obsession that often does more to exacerbate rather than solve the problem. It is precisely for this reason that so many liberal commentators are, for example, able to argue that social, economic and cultural rights are not really rights. Second, by shifting the focus from rights to dignity we are - hopefully - able to focus on the real needs of the impoverished masses in the South rather than the allocation to them of a range of abstract rights that often bear no relation to their daily lives.

[3]*Developing Countries and International Labour Standards: Proceedings of the Regional Seminar on Practice and Procedures in Formulating Labour Standards* ILO/ARPA (1982) cited in Wangel. *'The ILO and the Protection of Trade Union Rights: The Electronics Industry in Malaysia'* in Southall, R. (ed) (1988) TRADE UNIONS AND THE NEW INDUSTRIALIZATION OF THE THIRD WORLD (London: Zed Books) (1988).

hypocritical of Western states, which long denied worker rights in their own countries, to seek to impose standards that would undermine the exploitation of cheap labour in developing countries. Attempts to include a social clause in the General Agreement on Tariffs and Trade (GATT), were likewise attacked as a hidden form of protectionism. On the other hand, the fact that such complaints originate from countries whose overall human rights records are so poor leads only to the most cynical of conclusions.

The statement is a classic example of developmentalism, the notion that the only way to break free of the trap of underdevelopment in a structurally unequal global economy is through the ruthless deployment of national economic resources even if this is at the expense of democracy. To adherents of this position the Western celebration of the success of the 'Tiger' economies while lamenting their human rights records reveals a misunderstanding of Asian society at best and sheer hypocrisy at worst.

At the World Conference on Human Rights held in Vienna in 1993 Asian governments (notably China, Malaysia, Singapore, Indonesia, Thailand and Pakistan) insisted on the significance of economic development as a means of securing human rights for their peoples. In a startling inversion of the traditional prioritisation, they asserted the priority of economic rights over civil and political rights even as they stressed the diversity of approaches to human rights and criticised all forms of external intervention.

The argument that human rights standards originating in the West cannot be easily applied in Asian countries is perhaps the reason that Asia has such a comparatively poor record of ratifying international human rights instruments. It is also the only continent that does not have a regional organisation for promoting and protecting human rights. Yamane (1982 :651) argues that Asia is 'a conglomeration of countries' rather than a homogeneous entity. There is therefore 'no common historical experience in Asia,

whose different societies have completely distinctive social structures, political ideologies, legal systems, economic development and diverse religions and cultural traditions.' This underpins Cassese's (1990:53) explanation of the radical difference between the Western conception of human rights and those of Asian religions such as Buddhism, Hinduism and Confucianism. In the Buddhist conception, society is patterned on the family, and political leaders have all the powers, authority and responsibilities of a paterfamilias. Freedom consists therefore, not in guaranteeing a space free from possible invasion or oppression by the authorities, but in harmonising as far as possible the individuals action with the leaders. In the Hindu tradition, individuals are required to accept their social status irrespective of the inequalities this might lead to and 'there is no question of any struggle against authority or of safeguarding a sphere of freedom against an external power'. In the case of Confucianism, the family is once again the core of society, a vision that is extended to the state with the Emperor as the head of the society. This tradition also leaves little room for a Western conception of human rights.

There can be little doubt that current international human rights standards and the machinery, for enforcing lack legitimacy in major cultural traditions. In relation to Africa, it has been argued that the continent's inhabitants have long held different conceptions of human rights arising from their particular history, culture and traditions. Whereas the dominant discourse emphasises individualism and atomisation, African societies stress communal life, social harmony, and obligations and duties to the community. Both the African Charter on Human and People's Rights and the African Charter on the Rights and Welfare of the Child stress the particularities and implications of 'African civilisation'.[4] Cobbah (1987) has criticised the Eurocentric nature of

[4]Much as I would be willing to accept the notion of a particular African civilisation, I have persistent problems in identifying its content. It is difficult to comprehend the ties that bind north Africans living in Muslim societies and southern Africans living in a country like South Africa. It is even more difficult to discern consistent cultural patterns linking urban and rural Africins within the same nation state. Finally, the strongly patriarchal nature of many tribal

the dominant discourse and argued instead for an Afrocentric perspective. It is necessary, he argues, to seek a cross-cultural understanding that would strengthen the development of international human rights norms because Africans 'do not espouse a philosophy of human dignity that is derived from a natural rights and individualistic framework'.

> African societies function within a communal structure whereby a person's dignity and honour flow from his or her transcendental role as a cultural human being. Within a changing world, we can expect that some specific aspects of African lifestyles will change. It can be shown, however, that basic Afrocentric core values still remain and that these values should be admitted into the international debate on human, rights. The debate I believe should be on whether these cultural values provide human beings with human dignity. We should pose the problem in this light, rather than assume an inevitable progression of non-Westerners toward Western lifestyles. If we do this then we can really, begin to formulate authentic international human rights norms. (Cobbah 1987: 331).

There are, however, certain problems associated with such an approach, as the Butare Colloquium on Human Rights and Economic Development in Francophoine Africa pointed out:

> The colloquium agreed that, for many reasons, the automatic adoption of traditional rights, even if that were possible, would be inappropriate. The more important status given to the individual vis-a-vis the group in modern society was cited as one constraint; also, the traditional hierarchical structure which characterized most pre-colonial societies has largely disappeared. It therefore becomes necessary to select among the traditional rights and to determine how the positive values of traditional society can best be translated into modern African reality.[5]

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traditions gives rise to a feeling of uneasiness about the emphasis on African civilisation in these human rights instruments.

[5]Hurst Hannum, *'The Butare Colloquium on Human Rights and Economic Development in Francophone Africa: A Summary and Analysis'*, UNIVERSAL HUMAN RIGHTS 1, no. 2:63-87 at p.67.

consequences of limiting critical assessment and thereby 'disarms us, dehumanises us, leaves us unable to enter into communicative interaction; that is to say, unable to criticize cross-culturally, cross sub-culturally; intimately, relativism leaves no room for criticism at all... behind relativism nihilism looms'. The problem with absolutism, on the other hand, is that it leaves little room for nuance and no respect for difference. If morality was eternal, unchanging and absolute women would not have the vote and blacks would still be slaves.

An-Na'im (1992:25-26) argues that 'the merits of a reasonable degree of cultural relativism are obvious, especially when compared to claims of universalism that are in fact based on the claimant's rigid and exclusive ethnocentricity... [In] this age of self-determination, sensitivity to cultural relativity is vital for the international protection and promotion of human rights'. He therefore argues that whatever the perceived differences between Islam and the dominant discourse, the former cannot be disregarded in the development of human rights. Partly for tactical reasons and partly because people view human rights through a cultural prism, Islam must be taken into account. Certain aspects of Islam and Shari'ah law such as amputations as punishment for theft throw the cultural divide between the West and others into sharp relief and the fact that Islamic countries have acceded to international human rights instruments further muddies the waters. It is possible, he argues, to reconcile Islam with the dominant discourse without sacrificing Shari'ah as a whole but rather by modifying it in the true spirit of Islam.

> The Muslims themselves must seek ways of reconciling Shari'ah with fundamental human rights. The choice of the particular methodology for achieving these results must be left to the discretion of the Muslims themselves. A cultural relativist position on this aspect of the problem is, in my view, valid and acceptable. I should argue, however, that no cultural relativist argument may be allowed to justify derogation from the basic obligation to uphold and protect the full human rights of religious minorities, within the Islamic or any other cultural context (Al-Na-im 1987:18).

A RECENT INCARNATION OF THE DILEMMA: CUSTOMARY LAW AND FUNDAMENTAL RIGHTS IN SOUTH AFRICA

South Africa's 1993 interim Constitution provides a relatively recent example of the tensions between the Eurocentric universalising tendencies of the dominant discourse and the concerns of the three-quarters of the South African population whose domestic affairs are still de facto regulated by customary law. The Constitution incorporates a Bill of Rights, representing a huge step forward in the protection of human rights after the oppression of apartheid. The centrepiece of the fundamental rights in Chapter 3 is the Equality Clause, modelled closely on that in the Canadian Charter of Rights, which prohibits unfair discrimination, directly or indirectly, on the basis of race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture or language (Art. 8(2)).[6] The Constitution does not explicitly recognise customary law, but Section 31 recognises the right of every person to 'use the language and participate in the cultural life of his or her choice' and Chapter 11 constitutes traditional authorities.

By recognising customary law, albeit implicitly, while prohibiting gender discrimination, the Constitution has virtually invited a confrontation between two human rights cultures. Because customary law is thoroughly suffused by the notion of patriarchy, it is in danger of being purged by the Constitutional Court. As Bennett (1994:123) puts it, 'it is tempting to dramatize this threat, to portray human rights as the harbinger of western neo-imperialism and to represent customary law as the shield of an endangered indigenous culture'.[7] Arguing that human rights are no

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[6]The prohibition on gender discrimination is reiterated in Constitutional Principle III, Schedule 4.

[7]Bennet acknowledges that an authentic customary law (rather than that vulgarised by British colonialism and apartheid and always subordinate to Roman-Dutch common law) is one which by definition exists outside an official legal regime (1994:130).

more than the means towards the end of human dignity, Bennett believes that:

> If the advocates of human rights are prepared to give the argument of cultural relativism a sympathetic hearing, they may find that institutions peculiar to Africa can achieve the same objective as human rights. And a realistic appraisal of social and economic conditions in South Africa may indicate that existing institutions can cater for individual needs, in the short-term at least, more effectively than a bill of rights can.

Section 33(1), the limitation clause, permits laws of general application, which include customary laws, to limit the scope of fundamental rights so long as any such limitation is reasonable and justifiable and does not negate the content of the right in question. At the same time, it seems clear that the Equality Clause will prevail in any conflict with customary law. Not only does Section 4(1) state that the Constitution is supreme, but Section 35(1) directs courts to promote the values underlying an open and democratic society based on freedom and equality.

Women suffer numerous disabilities under customary law. To cite but three example, women cannot conclude marriages without the consent of their guardians because they are perpetual minors who are not technically parties to the marriage agreement. Upon divorce mothers do not have legally enforceable rights of access to their children or to maintenance. Customary law is also quite clear that widows cannot inherit any portion of their husband's estates (although they do have a right enforceable against the heir to maintenance from the estate). In Bennett's view (1994:129), 'a court bent on reform could not simply rule that a woman can inherit, it would have to go further to indicate the amount and in what circumstances. This is a matter best left to the legislature' - which is presumably more reflective of the interests of traditional cultures.

Bennett believes that the solution to such a conflict is best found outside the ambit of the Constitution, either through legislation or through resort by the Constitutional Court to the

common law. But given the enthusiasm with which South Africans have greeted the introduction of the Bill of Rights a challenge to standing of customary law appears inevitable.

Adopting a somewhat reactionary stance towards the Constitution that reads like an apologia for the Zulu tribe, Kerr (1994:730-31) argues male primogeniture is derived from the value placed upon family unity.

> If it is the case, as many say, that the family is no longer the close-knit unit it used to be, a possible reform in line with the prohibition on gender and age differentiation would be to rule that in the case of the succession, to the household head all children share equally. But that would be to introduce inheritance of assets instead of inheritance of the position as the head of the family... [This] would mean that the Constitution eliminates, with immediate effect, much of the customary law of persons and virtually all of the customary law of succession.

During a recent series of human rights seminars in South Africa, discussion repeatedly returned to the difficulty of reconciling these constitutional provisions. In particular, those concerned at the possible erosion of traditional cultural practices expressed concern at the perception of customary law as an unchanging monolith.

TOWARDS A RESOLUTION?

The current debate appears trapped between the Scylla of universalism and the Charybdis of relativism. The way out of this dilemma would therefore appear to be to seek a third way that eschews the vices of each while maintaining their virtues. The end of the Cold War has brought with it a unique opportunity to reconcile different approaches to human rights - which was unfortunately spurned in Vienna and is in danger of remaining unfulfilled.

An-Na'im (1992a and b) argues in favour of greater internal cultural discourse and cross-cultural dialogue as means towards this end To use H. L. A. Hart's analogy, there appears to a core of human rights on which the vast majority of states agree, surrounded by a penumbra of contentious issues, the most acute of which seem to be over the status of women.

Internal cultural discourse takes place in virtually all societies and the aim is to engage in it in a manner designed to stimulate debate about the desirability of progressive change. There is no point in merely asserting the universality of human rights where these run counter to prevailing cultural norms, virtues and experience and do not therefore enjoy legitimacy. An examination of South African customary law reveals not only the sexist nature of many of its provisions but also an internal dynamic and capacity for change.

This is, of course, desirable to the extent that change can be brought about at a pace and direction that satisfies both sides. Difficulties arise when the change advocated challenges the very basis on which social interaction is organised or seeks to reconcile the apparently irreconcilable. What is at stake is more than an ideological clash between proponents at either extreme. To the victim of an arranged marriage it is something that affects her whole life, to her parents her resistance may equally be symbolic of the dissolution of the social cement that held together their culture over centuries. To the tribal chief the complete removal of patriarchy from customary law would render that law little different from common law or statute and thereby make it redundant. The problem is even more acute in Islamic societies where, different interpretations of the Quran and the Shariah notwithstanding, fundamental perspectives leave little room for manoeuvre. So long as cultures and religions contain the capacity to reinvest themselves in a rapidly changing world, internal cultural discourse offers a way forward. For as Marx noted, it is social being that dictates consciousness and not consciousness that determines social being.

Equally important is the question of whether those not directly affected by its cultural practices of which they disapprove should be able to override the desires ot those who are. It is here that clashes between cultures are most stark. Cross-cultural dialogue may lead to greater understanding but in order for this to occur a far greater willingness to respect other values needs to be shown - and this is extremely unlikely in a world in which the demonisation of the alien other is regularly and cynically deployed by governments and media for domestic political purposes. Thus the Soviet Union is replaced by Islam, while the black and the Jew remain constant as symbols of external threat. Human rights education seems pointless in a world which persists in promoting stereotypical prejudices.

A major part of the problem is the form that human rights take, rooted as they are in a liberal legality whose *Weltanschuaang* is incapable of extending beyond the notion of a continuous war between atomised possessive individual bearers of rights. In order to protect them one must litigate, a costly adversarial form of engagement that characterises Western law. As feminist legal theory has demonstrated, law is a good but far from perfect mechanism for achieving progressive social change. The basic problem is that working through and within the law merely 'liberates' one into the narrow formal rationality of a discourse that privileges individual actions and is, in its Western incarnation, inextricably linked to the emergence of private property.

An approach that emphasises human dignity seeks to avoid some of these problems, not least by refusing to fetishise law. In doing so, however, we become dependent on political will. As the basic needs approach initiated by the ILO illustrated, it is one thing to expose the limits of the law and to highlight the broadbased nature of the problem, and another thing entirely to achieve the cooperation necessary to overcome the problems. To paraphrase von Clausewitz, human rights are the continuation of war by other means.

Arguably, progress has been made in promoting and protecting human rights during the past half century, but much remains to be done. There is a need to reformulate international human rights standards, consolidating them in a document that reflects the existence of nearly 200 states and transcends the ideological battles that led in 1966 to the adoption of separate covenants on civil and political rights on the one hand, and social, economic and cultural rights on the other. I would argue that the advantages of such a process would outweigh the dangers, not least because the renegotiation of an international bill of rights appropriate to the needs of the twenty-first century would enable us (i) to define the settled core of rights, (ii) to engage in debate those who shield behind cultural relativism, and (iii) to expose the inadequacy of arguments against social, economic, cultural and collective rights. Such a process would force the West to confront the hypocrisy of its rhetorical advocacy human rights and its practical denial of them in the South, to comprehend that the promotion of human rights requires more than words alone. Equally, it would expose the Asian prioritisation of economic rights for the sham that it is. We need, in short, to seek an integrated conception that clearly identifies human dignity rather than the protection of abstracted rights bearers as its *raison d'etre.* At the close of the most violent century in human history the prospects are not good. Thomas Hobbes was one of the ideological wellsprings of the liberal conception of human rights, and hence of their universality. But perhaps the most significant testament to the efficacy of the vision he shared is that for a majority of the world's population life remains 'nasty, brutish and short.'

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